

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROSEMARY BRIM DAVIS,

Plaintiff,

v.

HOMEcomings FINANCIAL,

Defendant.

Case No. C05-1466RSL

ORDER GRANTING IN PART AND
DENYING IN PART MOTION FOR
SUMMARY JUDGMENT AGAINST
THE CLASS AND FOR
DECERTIFICATION

This matter comes before the Court on a motion for summary judgment filed by defendant Homecomings Financial Network, Inc. ("Homecomings"). (Dkt. #89).

Homecomings argues that summary judgment is appropriate because plaintiff lacks standing to pursue her equitable claims on behalf of herself and the class. In the alternative, Homecomings requests that the Court decertify the class and grant summary judgment against plaintiff's individual claims for prospective equitable relief. At the request of the parties, the Court heard oral argument in this matter on May 31, 2007.

For the reasons set forth below, the Court grants the motion in part and denies it in part.

ORDER REGARDING MOTION FOR SUMMARY JUDGMENT
AGAINST THE CLASS AND FOR DECERTIFICATION - 1

I. FACTS

The facts in this case were set forth in the Court's October 10, 2006 Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment (Dkt. #83). Therefore, the background facts will not be repeated here.

On October 10, 2006, the Court certified the following class under Federal Rule of Civil Procedure 23(b)(2):

All persons who, within the applicable statute of limitations, paid a fee or cost to expedite statement to, or for the benefit of, Defendant Homecomings Financial Network, Inc. or its predecessors in connection with paying off a loan secured by a deed of trust or mortgage on residential real property located in Washington state, where the mortgage provided that it would be released without charge or the deed of trust contained the following provision, or one substantively equivalent: *Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Agreement to Trustee. Trustee shall reconvey the Property without warranty and without charge to the person or persons legally entitled to it. Such person or persons shall pay any recordation costs.*

In January 2004, Homecomings ceased charging the Expedite Fee. However, it appears that a borrower who has not yet paid off his or her loan and incurred the fee prior to the policy change could still be required to pay the fee. Plaintiff has paid off her loan and paid the fee. She does not have any on-going relationship with Homecomings.

II. DISCUSSION

A. Summary Judgment Standard.

On a motion for summary judgment, the Court must "view the evidence in the light most favorable to the nonmoving party and determine whether there are any genuine issues of material fact." Holley v. Crank, 386 F.3d 1248, 1255 (9th Cir. 2004). All reasonable inferences supported by the evidence are to be drawn in favor of the nonmoving party. See Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir. 2002). "[I]f a rational trier of fact might resolve the issues in favor of the nonmoving

1 party, summary judgment must be denied.” T.W. Elec. Serv., Inc. v. Pacific Elec.
2 Contractors Ass’n, 809 F.2d 626, 631 (9th Cir. 1987).

3 There are no genuine issues of material fact relevant to this motion. Instead, the
4 motion turns on purely legal issues.

5 **B. Plaintiff’s Standing.**

6 As an initial matter, plaintiff alleges that defendant’s argument that she lacks
7 standing is actually an untimely motion to reconsider the class certification order. That
8 order, however, did not address the standing issue, though defendant should have raised
9 the issue earlier. Regardless, standing is a jurisdictional issue that may be raised at any
10 time. United States v. Viltrakis, 108 F.3d 1159, 1160 (9th Cir. 1997). A class
11 certification order may be altered, amended, or revoked at any time before final
12 judgment. Fed. R. Civ. P. 23(c)(1)(C).

13 Plaintiff argues that she has standing because she has standing under Washington
14 law, and this Court, exercising supplemental jurisdiction, must apply Washington law.
15 As the Court previously held, it is not exercising supplemental or pendent jurisdiction.
16 Rather, it has diversity jurisdiction pursuant to the Class Action Fairness Act of 2005
17 (“CAFA”), Pub. L. No. 109-2.

18 A plaintiff must demonstrate “a real and immediate threat that he would again”
19 suffer the injury to have standing for prospective equitable relief. City of Los Angeles v.
20 Lyons, 461 U.S. 95, 105 (1983). Plaintiff has not shown, or even argued, a real and
21 immediate threat that Homecomings will condition release of her property on payment of
22 the Expedite Fee in the future. Instead, plaintiff alleges that she has standing because she
23 has suffered an injury. However, a plaintiff may have standing to sue for damages but
24 not for injunctive relief. See, e.g., id. The Supreme Court has opined that “past wrongs

1 do not in themselves amount to [a] real and immediate threat of injury.” Id. at 103.
2 Furthermore, standing to seek damages does not serve as a basis for standing to seek
3 equitable relief. Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999)
4 (en banc). In addition, under these circumstances, a plaintiff who has no on-going
5 relationship with the defendant lacks standing to obtain an injunction against its future
6 conduct. See, e.g., Hangarter v. Provident Life & Accident Ins. Co., 373 F.3d 998, 1021
7 (9th Cir. 2004).

8 Plaintiff notes that Rule 23(b)(2) classes were certified in this district in Hansen v.
9 Ticket Track, Inc., 213 F.R.D. 412 (W.D. Wash. 2003) and Kavu, Inc. v. Omnipak Corp.,
10 2007 WL 201093 (W.D. Wash. Jan. 23, 2007), even though plaintiffs in both cases
11 lacked on-going relationships with defendants. The Court does not focus exclusively on
12 whether the parties had an on-going relationship, though that fact is relevant to
13 determining whether plaintiff has shown a likelihood of future injury. Neither Ticket
14 Track nor Kavu raised a standing issue. More importantly, defendants’ allegedly
15 wrongful conduct in Ticket Track and Kavu was not based on any contractual
16 relationship. Therefore, defendants presumably could have repeated their violations at
17 any time. In contrast, in this case, the possibility that plaintiff could suffer the same harm
18 again is highly speculative and depends on the future renewal of a contractual
19 relationship. In order for plaintiff to suffer an injury again, Homecomings would have to
20 reinstitute the Expedite Fee, plaintiff would have to obtain another residential mortgage
21 loan serviced by Homecomings and request a faxed statement, Homecomings would have
22 to assess the fee against her again, the deed of trust would have to contain “without
23 charge” or substantially similar language, and Homecomings would have to condition
24 release of the property on payment of the fee. Standing cannot be established based on

1 “an extended chain of highly speculative contingencies” as is the case here. Nelsen v.
2 King County, 895 F.2d 1248, 1252 (1990). Plaintiff therefore lacks standing to pursue
3 injunctive relief.

4 Plaintiff also argues that she has standing to pursue declaratory relief pursuant to
5 the Declaratory Judgment Act. However, declaratory relief can serve as the basis for
6 certification under Rule 23(b)(2) only if it corresponds to injunctive relief with respect to
7 the class as a whole. The Advisory Committee note to the 1966 amendment to Rule
8 23(b)(2) states, “Declaratory relief ‘corresponds’ to injunctive relief when as a practical
9 matters it affords injunctive relief or serves as a basis for later injunctive relief.” As one
10 court has explained, “Stated differently, the declaratory judgment should be the
11 equivalent of an injunction.” McGlothlin v. Connors, 142 F.R.D. 626, 640 (W.D. Va.
12 1992) (citing 7A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure
13 § 1775 (2d ed. 1985 & Supp. 1997)).¹ The requirement is the same regardless of whether
14 the defendant is a private or public entity. See, e.g., Bird v. Lewis & Clark Coll., 303
15 F.3d 1015, 1019 (9th Cir. 2002) (explaining, in a suit against a private college, that “[i]n
16 the context of declaratory and injunctive relief,” the plaintiff must demonstrate that he or
17 she is threatened “with a sufficient likelihood that he will be again wronged in a similar
18 way”) (internal citation and quotation omitted). Because plaintiff’s threat of future injury
19 is at best speculative, her claim for declaratory relief regarding Homecomings’ on-going
20 or future practices must be dismissed because it is unripe. Hodgers-Durgin, 199 F.3d at
21 1044 (“The named plaintiffs’ failure to establish a likelihood of future injury similarly

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23 ¹ See also Gest v. Bradbury, 443 F.3d 1177, 1181 (9th Cir. 2006 (“[W]here, as
24 here, [the plaintiffs] seek declaratory and injunctive relief, they must demonstrate that
25 they are realistically threatened by a *repetition* of the violation”) (internal citation and
26 quotation omitted; emphasis in original).

renders their claim for declaratory relief unripe”).

Plaintiff argues that she has a viable claim for declaratory relief under Washington law, and pursuant to Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), this Court must apply state substantive law. Hangarter, however, was also a diversity case based on state substantive law. The Ninth Circuit nevertheless held that “a plaintiff whose cause of action . . . is perfectly viable in state court may nonetheless be foreclosed from litigating the same cause of action in federal court, if he cannot demonstrate the requisite injury to establish Article III standing.” 373 F.3d at 1022. Although plaintiff disagrees with Hangarter, this Court is bound to follow it. Plaintiff also argues that her substantive and procedural due process rights would be violated by a finding that she cannot pursue a claim for declaratory relief in federal court that would be available to her in state court. Plaintiff offers no authority in support of her argument, and it appears precluded by Hangarter. Furthermore, Article III standing is also a constitutional requirement, and the Court declines plaintiff’s invitation to elevate one constitutional right above another. Nor will the Court disregard the Article III standing requirement for the purpose of comity as plaintiff requests. Disregarding federal requirements in federal court in the name of comity is unwarranted by existing law and would wreak havoc on the judicial system and on the parties’ legitimate expectations.

Finally, plaintiff alleges that defendant is estopped from challenging her standing in federal court because it removed this case. Defendant, however, had a statutory right to remove this case. Doing so did not waive its right to contest certain federal requirements like Article III standing.

Therefore, plaintiff is not entitled to either an injunction or corresponding declaratory relief. Summary judgment is warranted on those individual claims.

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2 **C. Class Certification.**

3 Having determined that plaintiff lacks standing to pursue a claim for injunctive or
4 corresponding declaratory relief, the Court considers how to proceed.² Plaintiff alleges
5 that even if she lacks standing to pursue those claims individually, she has standing to
6 pursue injunctive relief for the class. The Ninth Circuit has rejected that argument. See,
7 e.g., Hodgers-Durgin, 199 F.3d at 1045 (“Unless the named plaintiffs are themselves
8 entitled to seek injunctive relief, they may not represent a class seeking that relief”); see
9 also Williams v. Boeing, 2005 U.S. Dist. LEXIS 27491 at *13 (W.D. Wash. 2005)
10 (explaining that “it is not enough that a named plaintiff can establish a case or
11 controversy between himself and the defendant by virtue of having standing as to just one
12 of many claims he wishes to assert. . . . Instead, each claim must be analyzed separately,
13 and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has
14 suffered the injury that gives rise to that claim”) (internal citation and quotation omitted).

15 Furthermore, even if plaintiff has standing to seek a declaration that
16 Homecomings’ *past* conduct was unlawful, that claim would not entitle her to represent a
17 class. That claim does not “correspond” to an injunction and is not the type of relief
18 contemplated by Rule 23(b)(2). Also, a declaration regarding past conduct would simply
19 duplicate her claim for damages. Accordingly, under the circumstances, plaintiff’s claim
20 for declaratory relief does not predominate and certification under Federal Rule of Civil
21 Procedure 23(b)(2) is not warranted. See Molski v. Gleich, 318 F.3d 937, 947 (9th Cir.
22 2003) (explaining that “the claim for monetary damages must be secondary to the primary
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24 ² In her opposition, plaintiff requests that the Court remand the case. The Court
25 has denied that request in a separate order regarding plaintiff’s motion to remand.

1 claim for injunctive relief”).

2 Rather than decertifying the class, plaintiff requests that the Court redefine the
3 class to include persons with whom Homecomings has a current loan servicing
4 relationship. Plaintiff requests additional time to locate a class representative who has a
5 current loan servicing relationship with Homecomings. The gravamen of the complaint
6 and claims, however, is that Homecomings breached the contract and violated the
7 Consumer Protection Act by requiring payment of the Expedite Fee as a condition of
8 releasing the loans. A current borrower, therefore, has not suffered any injury, and like
9 Davis, any potential future injury to such a person is too speculative to satisfy the injury-
10 in-fact requirement of Article III. Also, substitution is not warranted because this is not a
11 case where the named plaintiff had a valid claim that later became moot.³ Lierboe v.
12 State Farm Mut. Auto. Ins. Co., 350 F.3d 1018, 1023 n.6 (9th Cir. 2003). The Lierboe
13 court considered “judicial economy considerations” and concluded that

14 because this is not a mootness case, in which substitution or intervention might
15 have been possible, we remand this case to the district court with instructions to
16 dismiss. We are persuaded by the Seventh Circuit’s approach in an analogous
17 case, Foster v. Center Township of LaPorte County, 798 F.2d 237, 244-45 (7th
18 Cir. 1986), which held that where the sole named plaintiff “never had standing” to
19 challenge a township’s poor-relief eligibility guidelines, and where “she never was
20 a member of the class she was named to represent,” the case must be remanded
21 with instructions to dismiss.

22 Id. at 1022-23 n.6. Similarly, in this case, substitution or intervention is not warranted.

23 The Court, however, denies defendant’s request to dismiss the class claims with
24 prejudice. If defendant had raised the standing argument sooner, the Court would not
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26 ³ Furthermore, substitution at this point would result in significant delay and
substantial additional cost. The parties would need to retake discovery and file new
motions regarding summary judgment and class certification. Also, the deadline to file
amended pleadings has passed.

1 have certified a class, and the unnamed class members' claims would not have been
2 implicated. The Court therefore orders decertification of the class rather than summary
3 judgment on their claims.

4 III. CONCLUSION

5 For all of the foregoing reasons, the Court DENIES defendant's motion for
6 summary judgment against the class, GRANTS defendant's request to decertify the class,
7 and GRANTS defendant's motion for summary judgment regarding plaintiff's individual
8 claims for an injunction and for declaratory relief regarding future conduct. (Dkt. #89).
9 Plaintiff's individual claims for an injunction and for declaratory relief based on
10 Homecomings' present or future conduct are dismissed with prejudice. Plaintiff may
11 pursue her individual claims for damages and for a declaratory judgment that
12 Homecomings' past conduct breached her contract and violated Washington's Consumer
13 Protection Act. The class, previously certified under Federal Rule of Civil Procedure
14 23(b)(2), is decertified. Because notice of the certification has not been sent to class
15 members, no additional notice must be sent of the decertification unless the parties argue
16 otherwise within ten days of the date of this order.

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18 DATED this 1st day of June, 2007.

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21 Robert S. Lasnik
22 United States District Judge
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